86-865

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BENITA T. JONES,

Petitioner,

v.

FLAGSHIP INTERNATIONAL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Does §704(a) of Title VII of the Civil Rights Act of 1964 permit an employer to discharge an employee whose duties include representing it in EEO matters solely because that employee filed a charge of discrimination with the EEOC and otherwise engaged in activities protected by Title VII?

2. Did the court of appeals apply the correct legal standard when it held that the discharge of petitioner was legal under Title VII?

PARTIES

All of the parties are set out in the caption.

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No. 86-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

BENITA T. JONES,

Petitioner,

v.

FLAGSHIP INTERNATIONAL, d/b/a SKY CHEFS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI T O THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Benita T. Jones prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on July 9, 1986, petition for rehearing denied August 21, 1986.

OPINIONS BELOW

The decision of the Court of Appeals of July 9, 1986, is reported at 793 F.2d

714 and is set forth in the appendix at pages 1a-28a. The order of the Court of Appeals denying a petition for rehearing is not reported and is set forth in the appendix at page 29a-30a. The decision of the United States District Court for the Northern District of Texas, Dallas Division, is not reported and is set forth in the appendix at pages 31a-61a.

JURISDICTION

The judgment of the Court of Appeals affirming the decision of the district court was entered on July 9, 1986. The Court of Appeals granted an extension of time to and including August 6, 1986, to file a petition for rehearing. The petition for rehearing was timely filed on August 6, 1986. On August 21, 1986, the Court of Appeals denied the petition for rehearing. Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 2000e-3(a), § 704(a) of Title VII of the Civil Rights Act of 1964, as amended, which provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . ., because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(July 2, 1964, P.L. 88-352, Title VII, § 704, 78 Stat. 257; Mar. 24, 1972, P.L. 92-261, § 8(c), 86 Stat. 109.).

STATEMENT OF THE CASE

A. Proceedings Below

Petitioner Benita T. Jones, a black woman, commenced this action in the United States District Court for the Northern District of Texas, Dallas Division in 1982 after a receipt of a right to sue letter

from the Equal Employment Opportunity Commission.

The complaint raised a number of claims concerning violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, and the Equal Pay Act, including claims that the petitioner had been subjected to sexual harassment; that she had been denied promotions discriminatorily; and that she had been denied equal pay, all because of her race and/or sex. In addition, the complaint alleged that petitioner had been discharged because she had filed a complaint of discrimination with the Equal Employment Opportunity Commission and had otherwise opposed practices that were in violation of Title VII.

After a trial before the court, the district court ruled against petitioner on all claims and its decision was affirmed

by the court of appeals. The present petition raises only one claim: that petitioner was discharged in violation of 42 U.S.C. § 2000e-3(a) in that she was discharged because she filed a complaint with the EEOC and otherwise opposed discriminatory policies of the respondent employer.

B. Statement of Facts

Petitioner was employed by Flagship International in the position of manager of Equal Employment Opportunity programs. Her principal duties were to prepare an affirmative action plan and to investigate charges of employment discrimination brought against the company. (App. p.33a.) Although petitioner is an attorney, the position she held was not that of a lawyer as such. Thus, while her duties included defending her employer before state and local administrative

agencies against discrimination charges brought by other employees of Flagship International, she "had no responsibility to litigate them in court." (App., p.33a.)

After a series of incidents petitioner filed with the Equal Employment Opportunity Commission a charge that she herself had been discriminated against in violation of Title VII in that she had been subjected to sexual harassment by her immediate supervisor and she had received a lower salary for work essentially the same as that done by male employees.

It is undisputed that upon learning of the EEOC charge her employer suspended her from her duties as EEO officer. (App., p. 47a-48a.) Subsequently, her employer claimed that there were a number of events related to her EEO charge and opposition to activities believed to

violate Title VII that resulted in her termination.

First, her employer claimed that she had solicited the support of two other black women employees of Flagship International for her claims that there was a policy of discrimination based on race and sex. Second, her employer claimed that her retained attorney stated that she was planning to expand her individual claim into class action on behalf of all black and female employees of the company. Third, the company claimed that she had violated company policy by removing a confidential personnel file.

The district court, although, it ruled against petitioner, did so on a limited basis. The court recited the events which were alleged to constitute sexual harassment and simply held that

they did not rise to the level of creating a hostile work environment and that she had not been adversely affected by her supervisor's actions. (App. 39a-46a.) The court rejected the failure to promote claim on the ground that it had not been raised in the EEOC charge (App. 50a-51a) and the equal pay claims on the lack of evidence showing an inequality of equal pay for comparable work. (App. 51a-57a.)

With regard to the claim of retaliation, the court did not dispute the fact that the reason for plaintiff's suspension and then discharge was her participation in protected activities. Indeed, it rejected her employer's claim that she had violated company policy by her use of a personnel file. Further, the district court made no findings with regard to the alleged threat of a class action. It only found that she had given

"aid and comfort" to only one other employee to pursue a claim of discrimination against the company. (App. 48a-49a.) It was solely on the basis of this one incident that the court held that the company was justified in terminating petitioner, i.e., because there was a conflict with petitioner's role as the company's EEO representative.

The court of appeals affirmed the denial of the retaliation claim but on a somewhat different basis. It held that petitioner had met her burden under McDonnell-Douglas Corp. v. Green, 411 U.S.792 (1973), and its progeny and had made out a prima facie case that "but for" her filing of a charge with the EEOC she would not have been fired. (App. p. 20a) The court further concluded, however, that respondent employer had met its McDonnell-Douglas burden of articulating a

legitimate, non-discriminatory basis for the discharge because of the conflict of interest with her duties as an EEO officer resulting from not only her filing an EEO charge, but because of her alleged plan to initiate a class action of employment discrimination against the company.[1]

Therefore, the court concluded, whatever the protections available to other types of employees under § 704(a) of Title VII, petitioner could be discharged because her duties included "representating her company on equal employment matters." (App. 25a.) In short, Jones could be fired because she: (1) had filed a discrimination charge

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[1] The court of appeals made this finding based on its own review of the record even though it acknowledged that the district court had not relied on this alleged incident. (App. 23a-24a.) Indeed, the district court did not even find that the purported conversation had occurred.

against her employer; (2) had suggested that a class action suit would follow; and (3) had invited other employees to bring charges or join in her complaint. (App. 26a - 27a.) Therefore, the employer was entitled to judgment under the McDonnell Douglas - Burdine analysis.

REASONS FOR GRANTING THE WRIT

I.

THIS CASE RAISES AN IMPORTANT QUESTION RELATING TO THE PROTECTIONS AVAILABLE UNDER TITLE VII TO EMPLOYEES WHO PURSUE THEIR STATUTORY RIGHTS.

Pending before this court is a petition for a writ of certiorari in Holden v. Owens-Illinois, Inc., No. 86-645. That case raises a question closely related to the present case; to what extent does an employee whose job duties include internal EEO enforcement forfeit her rights under Section 704 of Title VII.

Here, it is undisputed that the reasons for the adverse action taken against petitioner, beginning with her suspension and culminating with her discharge, were her filing an EEOC complaint and taking other actions in opposition to alleged discriminatory practices that clearly come within the scope of activity protected by the

statute. The justification presented by the company, and accepted by the lower courts, is that, because plaintiff had as one of her duties the defense of the employer against EEO claims brought by other employees, there was an inherent conflict of interest between her retaining her position and pursuing her own rights under Title VII. The courts below essentially have read into the statute an exception to the protections of 704 (a) for a certain class of employees, even though there is no support for such an exception in either the section's language or the legislative history of Title VII.

As noted in the petition in Holden, the question of the scope of the protections of Section 704 for EEO personnel is both recurring and important. Petitioner respectfully suggests that it would be appropriate to hold this petition

pending the Court's disposition of the petition in Holden. If certiorari is granted in Holden, then an appropriate order could be entered here depending on the outcome of that case. If certiorari is denied in Holden the present petition could then be considered and granted.

II.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN TRANS WORLD AIRLINES, INC. V. THURSTON AND WITH DECISIONS OF THE ELEVENTH CIRCUITS.

As discussed above, the basis of the court of appeals' decision with regard to plaintiff's retaliation claim was an application of the standards in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). However, this Court held in Trans World Airlines, Inc. v. Thurston, 469 U.S. ___, 83 L.Ed.2d 523 (1985) that the McDonnell-Douglas analysis was inapplicable where there was direct evidence of a violation of the statute.

In Thurston it was clear that the reason for the forced retirement of the plaintiffs was a policy based on age in violation of the Age Discrimination in Employment Act. Similarly here, it is undisputed that the reason for the suspension and then discharge of the petitioner was her involvement in actions protected by of Title VII.

Given the direct evidence of a statutory violation, it was erroneous to permit a defense based on evidence of a "legitimate, non-discriminatory reason" for the adverse action.[2] Rather, as in Thurston, any defense to the merits of petitioner's claim had to come from the language of the statute. As we have noted

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[2]Prior to Thurston the same result had been reached by the Eleventh Circuit in Lee v. Russell County Bd. of Ed., 684 F.2d 769, 772-74 (11th Cir. 1982); see also Thompkins v. Morris Brown College, 752 F.2d 558, 563 (11th Cir. 1985).

above, the statute contains no language that can support the conclusion that any class of employees is not entitled to its protection because of the nature of their duties.[3] Respondent could, at best, defend against relief being granted by

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[3]The decision of the court of appeals was also in error in two other respects.

(1) The court acknowledged that one of the reasons for petitioner's discharge was the filing of an EEOC charge and that, standing alone, a discharge for that reason might constitute a violation of the Act. (App. 23a.) However, since there were two other reasons--the alleged class action threat and the encouragement of another employee--the discharge was lawful. This result is inconsistent with the rule that if an unlawful reason contributed to an adverse action, the employer must prove that the same action would have been taken in the absence of the unlawful reason. See Mt.Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 285-87 (1977). No such burden of proof was placed on the respondent here.

(2) The court's independent review of the evidence and its making a finding that one of the reasons was the alleged threat of a class action was directly contrary to this Court's decisions in Pullman-Standard v. Swint, 456 U.S. 273, 291-92 (1982) and Lehman v. Trout, 465 U.S. 1056 (1984).

demonstrating that the action would not have been taken even in the absence of the illegal conduct. Such a showing was not made here.

At the very least, the employer should have been required to demonstrate that any legitimate interest it had in avoiding a conflict of interest between petitioner remaining as its EEO representative and her pursuing her statutory rights could not have been reasonably accommodated by placing her in another position without loss of pay or any diminution of the terms and conditions of employment, rather than discharging her. Cf., e.g., Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

In short, the decision below fundamentally erred in holding that petitioner was not entitled to the full protection of Title VII because of the

nature of her duties. Such a result finds no support in the clear language of § 704 (a), is at odds with the intent of Congress, and is inconsistent with decisions of this Court. See Hishon v. King & Spaulding, 467 U.S. 69 (1984). Certiorari should be granted to address these important issues.

CONCLUSION

The petition for writ of certiorari should be held for disposition in light of Holden v. Owens-Illinois, Inc., No. 86-645. In the alternative, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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A P P E N D I X

Decisions of the Courts Below

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

B. T. JONES,
Plaintiff-Appellant,

v.

FLAGSHIP INTERNATIONAL d/b/a/ SKY CHEFS,
Defendant-Appellee.

No. 85-1124
OPINION

Filed July 9, 1986

Before: Thomas Gibbs Gee, Alvin B. Rubin, and Reynaldo G. Garza, Circuit Judges.

Opinion by Judge Reynaldo G. Garza

Appeal from the United States District Court
for the Northern District of Texas
A. Joe Fish, District Judge, Presiding

SUMMARY

Employment Discrimination

Appeal from judgment in favor of defendant and denial of request to amend complaint. Affirmed.

The appeal arises from appellant Jones' sexual harassment, racial and sexual discrimination and unlawful retaliatory charges against her former employer, appellee Flagship International (Flagship). Flagship had employed Jones as its Manager of Equal Employment Opportunity (EEO) Programs. Her principal duties involved dealing with employment discrimination claims against Flagship. The district court found for Flagship on all of Jones' claims. Jones contends that the court erred in failing to find sex-based discrimination in terms of pay and promotion, sexual harassment, retaliation, and

that the court abused its discretion in denying her leave to amend her complaint. The Equal Employment Opportunity Commission (EEOC), as amicus curiae, contends that the court erred in not finding retaliation on Flagship's part.

[1] In a suit arising under Title VII the ultimate burden rests upon the plaintiff to prove, by a preponderance of the evidence, unlawful discrimination. [2] In claims of disparate treatment on the basis of sex, the factual inquiry is whether the defendant intentionally discriminated against the plaintiff. [3] In order to establish a claim against an employer for a hostile work environment, the plaintiff must show (1) the employee belongs to a protected group, (2) the employee was subject to unwelcome sexual harassment, (3) the harassment complained of was based upon sex, (4) the harassment complained of affected a term, condition or privilege of employment, and (5) respondeat superior. [4] While an employee need not prove tangible job detriment to establish a sexual harassment claim, the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment. [5] Although this court agrees that the district court's ruling fails to recount in detail all of the incidents reported by Jones, it disagrees with the court's conclusion that the conduct complained of was not sufficiently pervasive to constitute a hostile work environment. [6] This court finds unpersuasive Jones' arguments supporting her claim that the court's finding that she did not suffer adverse employment was clearly erroneous. [7] In order to establish a claim under the Equal Pay Act, Jones must show (1) that her employer is subject to the Act, (2) that she performed work in a position requiring equal skill, effort and responsibility under similar working conditions, and (3) that she was paid less than members of the opposite sex. The court correctly found that Jones failed to show a violation of the Act by a comparison with male Flagship employees. [8] As to Jones' Title VII equal pay claim, she is required to show that Flagship intentionally discriminated against her on the basis of her sex. Jones failed to establish a discrimination in pay claim under Title VII also. [9] As to Jones' failure to promote claim, she did not submit any evidence that she applied for a position for which she was qualified and rejected, and which was later filled by a male employee.

[10] This court concludes that Jones did meet her prima facie burden of showing that but for her filing charges with the EEOC she would not have been suspended and terminated from her employment. However, Flagship presented evidence sufficient to rebut Jones' prima facie case and to support the district court's conclusion that Flagship did not engage in unlawful retaliation. **[11]** In assuming her position as Flagship's Manager of EEO Programs, Jones neither abandoned her right to be free from discriminatory practices nor excluded herself from its protections. **[12]** However, although eliminating discriminatory employment practices is the goal of Title VII, cooperation and voluntary compliance are the preferred methods of promoting that goal. **[13]** This court need not decide the extent to which an employer may act in relieving an employee of her EEO duties without running afoul of her rights, or to whether Flagship's response was sufficiently excessive to constitute unlawful retaliation. The record establishes that Jones' filing of charges with the EEOC was not the sole reason for Flagship's action at the time of suspension. **[14]** The courts have required that employee conduct be reasonable in light of the circumstances, and have held that the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare. **[15]** Jones' actions not only rendered her ineffective in the position for which she was employed, but critically harmed Flagship's posture in the defense of discrimination suits brought against the company. **[16]** Flagship, having met its burden of production by providing a legitimate, nondiscriminatory basis for its action, rebutted Jones' prima facie case and shifted the burden of persuasion to Jones to show that Flagship's proffered explanation is unworthy of credence. **[17]** Moreover, Flagship need not have been correct in its basis for suspending and discharging Jones to show that its actions were motivated by non-retaliatory reasons. **[18]** This court holds that Flagship presented sufficient, credible evidence to show that its actions were motivated by non-retaliatory reasons, and therefore, to rebut Jones' case. **[19]** Given the late date of Jones' motion to amend her complaint, the district court's denial was not an abuse of its discretion.

OPINION

REYNALDO G. GARZA, Circuit Judge:

Benita T. Jones filed suit against her former employer, Flagship International ("Flagship"), under 42 U.S.C. §§ 2000 et. seq. ("Title VII"), 29 U.S.C. § 206(d) (the "Equal Pay Act"), and 42 U.S.C. § 1981.[1] Flagship hired Jones, a licensed attorney in Little Rock, Arkansas, on July 30, 1979, as the company's "Manager of Equal Employment Opportunity (EEO) Programs". Jones' principal duties were to investigate charges of discrimination brought against the company, to represent the company before state and federal administrative agencies, to "conciliate" such discrimination charges, and to prepare an affirmative action plan. Jones initial salary of $21,000 was increased to $22,050 in November, 1979; to $23,153 in June, 1980; and to $27,000 on August 29, 1980.

At Flagship, Jones was placed under the supervision of Jared Metze, the Vice-President in charge of Personnel. Jones testified at trial that Metze subjected her to sexual harassment throughout her tenure at Flagship. According to Jones, she had been with Flagship for six weeks when she, Metze, and others went on a business trip to Chicago. Although Metze sent the others home, he and Jones continued on business to Detroit before returning to Dallas. Jones testified that Metze had been driving her home from the airport when she expressed concerns about the security of the hotel in Chicago in which they had stayed. At this point, Metze replied that his wife did not know he was back in town, and offered to take Jones to a "reputable" hotel in Dallas because she needed the "comfort of a man." Jones further testified that she had been so distressed by this incident that she left for Little Rock the next day, remained there for two weeks, and returned only upon Metze's promise that such an incident would not recur.

Jones then testified as to two further occurrences several months later. According to Jones, Metze propositioned her during a trip to San Francisco, and, during a trip to Denver, told her that she was "off the hook" because of a friend's interest in her. Jones stated that

[1]Jones' claim under 42 U.S.C. § 1981 is not before this court on appeal.

she rebuffed these as well as numerous other advances. Metze denied making any advances toward Jones.

A final "sex-related" incident occurred during Flagship's headquarters office Christmas party in December, 1981. On that occasion Kurt Elmer, the company's Executive Chef and Vice-President, created figures of bare-breasted mermaids as table decorations. After receiving several complaints from female employees, Jones asked Metze whether a complaint should be made to Elmer. Metze proposed that Jones prepare a memo on the matter in order to avoid upsetting Elmer at the party. Jones later wrote such a memo, expressing the distaste of female employees for the figures, and received in reply a short polemic from an obviously unrepentent Elmer.

In addition to sexual harassment, Jones testified that she had been discriminated against in terms of pay and promotion while at Flagship. According to Jones, she made several complaints to Metze and Joseph Primavera, the company's Assistant Vice-President of Employee Relations and another of Jones' supervisors, concerning her pay since the spring of 1980. Jones testified that her grievances were ignored.

Jones mentioned her complaints to Peter Vygantas, the company's Senior Vice-President for Administration, during a meeting on January 27, 1982. Jones stated that during the course of the discussion Vygantas asked for a dollar amount of Jones' claims. Jones testified that, in order to get the necessary information for Vygantas, she had to derive salary data from the salary record cards of Metze and Catherine Sharp, her immediate predecessor; this, in turn, required Jones to copy data from their personnel files. Jones further testified that she continued to discuss her complaints, including sexual harassment, in subsequent meetings with Vygantas and Metze.

On February 3, 1982, Jones filed a charge with the EEOC, claiming discrimination in pay and sexual harassment. On February 11, Metze and Vygantas learned of the charge; the latter suspended Jones with pay on the following day. Vygantas testified that the action was necessary because of the conflict of interest created by Jones' position with the company. Shortly after Jones' suspension,

Barbara McCaffrey, Metze's secretary, told Metze that she had seen copies of his personnel file in Jones' home. Metze informed Vygantas of this information, as well as information that Jones had solicited Dorothy Smith, another female employee, to file a charge of sex discrimination against the company. Vygantas also testified that he had learned from a security investigation interview conducted on March 22, 1986, that Jones had "invited" Patricia Love, another female employee, to "participate" in an action against the company during the course of numerous meetings between Jones and Love in January, 1982.[2]

As a result of this information, Vygantas terminated Jones' employment on April 15, 1982. According to Vygantas, this action was necessary because of the "lack of confidence the company had in her because she clearly had a conflict of interest in performing her duties," Jones' misuse of company property, *i.e.*, Metze's personnel file, in acquiring information concerning salaries, and Jones' attempt to encourage others to file charges against Flagship.[3] Jones

[2]Investigators of the Security Department of American Airlines, Inc., then Flagship's parent company, conducted the interview as part of Flagship's investigation into Jones' claims.

[3]In a discharge letter to Jones, Vygantas summarized the basis of his action:

> When commencing my investigation on the claim you had made, we learned that you had surreptitiously copied and taken home all or a part of a personnel file of Mr. J. R. Metze, your immediate supervisor. Further, we discovered that you had shown copies of a portion of the file to at least one employee at your home. When I asked you on February 18, about having Mr. Metze's file or a copy of thereof, you denied it. Yet, you later admitted to the Company's Security Representatives investigating your charges against Mr. Metze that you had reproduced his payroll records.
>
> As you know, Sky Chefs General Rules of Conduct state:
>
> > 27. The use of Company time, material or facilities for purposes not directly related to Company business, or the removal or borrowing of Company property without permission is prohibited.
>
> Based on the above information, you have violated this rule. More importantly, your misconduct was a gross violation of the privacy of a co-employee. It is especially intolerable of a management employee such as yourself having for business purposes access to privileged information.

then filed a second charge with the EEOC, charging unlawful retaliation.

On October 1, 1982, Jones filed a "class action complaint" which alleged numerous claims on behalf of blacks, women and herself, including claims of discrimination in terms of pay and promotion, sexual harassment and retaliation. During the class certification proceedings, Flagship moved to dismiss the class allegations of Jones' complaint. The district court disqualified Jones as a class representative on the basis of *Doe v. A. Corp.*, 709 F.2d 1043, 1047-48 (5th Cir. 1983) (holding that a corporation's former house counsel who had rendered legal advice concerning employee benefits to the corporation prior to his resignation was barred by his ethical obligations as a lawyer from prosecuting, as a class representative of other employees, benefits allegedly due under the corporation's pension and life insurance plans); on November 8, 1983, the court dismissed Jones' class allegations from the complaint.

On January 11, 1984, Jones sought to amend her complaint to include additional defendants, to plead state law claims for invasion of privacy, defamation, intentional infliction of emotional stress, and to add other federal claims under 42 U.S.C. §§ 1985, 1986. By order dated February 1, 1984, the district court denied Jones' leave to amend. Following trial, which commenced on March 12, 1984, and concluded on March 15, 1984, the district court, in its Memorandum of Decision and Judgment, dated January 24, 1985, entered judgment for Flagship. This appeal followed.

In the course of the Company's inquiry, it was also found while in your job of Manager—EEO Programs, before you had filed a claim personally, you had solicited other Sky Chefs' employees to file charges of discrimination against the Company. Such actions on your part are wholly at odds with the responsibilities of your job. As an Attorney, I hope you can appreciate the conflict of interest inherent in soliciting claims against the very client you represent.

Your misconduct in secretly reproducing your supervisor's personnel records, coupled with your lack of honesty about the subject, and your attempts to initiate and encourage other charges against Sky Chefs has rendered you ineffective in your present job. Therefore, as previously communicated to your Attorney by Sky Chefs' Legal Counsel, your employment with Sky Chiefs was terminated as of April 15, 1982. . . .

THE NATURE OF JONES' CLAIMS

Jones' claims at trial were grounded on racial and sexual discrimination. The district court found that there was "not the slightest hint that race was even a factor in any of Flagship's employment decisions regarding Jones." It is well established that such a finding is final unless clearly erroneous. F.R.Civ.P. 52(a) A finding is not clearly erroneous unless "the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City, N.C.*, — U.S. —, 105 S.Ct. 1504, 1511 (1985) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948)). By contrast, a district court's legal conclusion is subject to an appellate court's plenary review.

Jones has abandoned her race discrimination claims, and, on appeal, argues that the district court erred in failing to find sex-based discrimination in terms of pay and promotion, sexual harassment and retaliation. Jones also claims that the court abused its discretion in denying her leave to amend her complaint. Finally, the Equal Employment Opportunity Commission ("EEOC"), as *amicus curiae*, contends that the court erred in not finding retaliation on Flagship's part.

[1] Most of Jones' complaints fall under Title VII. It is well settled that in a suit arising under Title VII the ultimate burden rests upon the plaintiff to prove, by a preponderance of the evidence, unlawful discrimination.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant 'to articulate some letigimate, nondiscriminatory reason for the employee's rejection.' . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pre-text for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 67 L.Ed.2d 207, 215 (1981) (citations omitted). *Accord, McDonnell Douglas Corps v. Green*, 411 U.S. 792, 804-05 (1973).[4]

[2] Because Jones' claims under Title VII allege "disparate treatment" on the basis of sex, the "factual inquiry" is "[whether] the defendant intentionally discriminated against the plaintiff." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983) (quoting *Burdine*, 450 U.S. at 253). "In other words, is 'the employer . . . treating some people less favorably than others because of their race, color, religion, sex, or national origin'." *Id.* (quoting *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1975)). With the foregoing standards and burdens in mind, we now turn to Jones' claims.

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[4]In *Burdine* the Supreme Court stressed the importance of the prima facie case in Title VII actions.

> The burden of establishing a prima facie case of disparate treatment is not onerous [and] serves an important function in litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection. See *Teamsters v. United States*, 431 U.S. 324, 358, and n.44, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). As the Court explained in *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 597 (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the fact of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.[7]
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> * * * * * * * * * * * *
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> [7]The phrase "prima facie case" may denote not only the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed 1940). McDonnell Douglas should have made it apparent that in the Title VII context we use "prima facie case" in the former sense.

Id. 450 U.S. at 253-54.

I. *Sexual Harassment*

[3] Sexual harassment is a form of employment discrimination prohibited by Title VII. *Simmons v. Lyons*, 746 F.2d 265, 270 (5th Cir. 1984). In determining that Jones failed to make out a claim of sexual harassment, the district court referred to the "hostile work environment" and "*quid pro quo*" paradigms outlined in *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982).

a. *Hostile Work Environment*

In order to establish a claim against an employer for a hostile work environment, the plaintiff must show the following:

(1) *The employee belongs to a protected group, i.e.*, a simple stipulation that the employee is a man or a woman;

(2) *The employee was subject to unwelcome sexual harassment, i.e.*, sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome in the sense that it is unsolicited or unincited and is undesirable or offensive to the employee;

(3) *The harassment complained of was based upon sex, i.e.*, that but for the fact of her sex, the plaintiff would not have been the object of harassment;

(4) *The harassment complained of affected a "term, condition or privilege of employment," i.e.*, the sexual harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment;

(5) *Respondeat superior, i.e.*, that the employer knew or should have known of the harassment in question and failed to take prompt remedial action.

Id. at 903-05.[5]

[5]In contrast to the role of the "prima facie case" in the typical disparate treatment context.

[4] In concluding that Jones failed to establish a hostile work environment, the district court recounted Jones' testimony concerning her trips with Metze to Chicago and Denver and the Christmas party incident. The court found that the harassment complained of was insufficiently pervasive to alter a condition of Jones' employment and create an abuse working environment.[6] The court also noted that Jones failed to demonstrate that she had been adversely affected, and that she admitted to the absence of an adverse affect.

Jones contends that the district court erred in two respects. First, Jones asserts that "tangible job detriment" or adverse employment effect is not necessary to establish a prima facie case of sexual harassment under Title VII. We agree. *See e.g., Henson*, 682 F.2d at 901 ("under certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible job detriment"); *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (that sexual harassment causing a hostile work environment is prohibited "follows ineluctably from numerous cases finding Title VII violations where an employer created or condoned a substantially [racially] discriminatory work *environment*, regardless of whether the complaining employees lost any tangible job benefits"). *See generally, Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971). The trial court's ruling, however, is not to the contrary. We conclude, as did the court below, that while an employee need not prove tangible job detriment to establish a sexually harassment

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the case of sexual harassment that creates an offensive environment does not present a factual question of intentional discrimination which is at all elusive. Except in the exceedingly atypical case of a bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex. We therefore see no reason to suggest a specific prima facie case for the hostile environment claim. In trying these cases, the district courts should employ normal principles of pleading and proof allocation. These principles may, in some cases, dictate that the allocation scheme vary in the individual case because of superior knowledge on the part of one party or other similar factors.

Id. at 905, n.11.

[6]Implicit in the district court's conclusion is that Jones established the first three elements of the hostile work environment paradigm.

claim, the absence of such detriment requires a commensurately higher showing that the sexually harassing conduct was pervasive and destructive of the working environment.

In *Rogers, supra*, this court held that the state of psychological well-being is a term, condition, or privilege of employment within the meaning of Title VII: "One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." 454 F.2d at 238. However, the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" does not affect the terms conditions, or privileges of employment to a sufficiently significant degree to violate Title VII. *Id.* "Whether sexual harassment at a workplace is sufficiently severe and persistent to affect seriously the psychological well-being of an employee is a question to be determined with regard to the totality of the circumstances." *Henson*, 682 F.2d at 904.

[5] Jones argues that the district court's ruling, by reciting only three sex-related incidents, understates the pervasiveness of the sexual harassment she experienced at Flagship. According to Jones, the number of "sexually harassing" incidents reported establishes a sexually abusive and hostile working environment. Although we agree that the district court's ruling fails to recount in detail all of the incidents reported by Jones, we do not disagree with the court's conclusion that the conduct complained of was not sufficiently pervasive to constitute a hostile work environment.[7]

[6] Jones argues, alternatively, that she did suffer adverse employment action and that the court's ruling to the contrary is clearly erroneous. Jones' claim is based on the following: (i) that the incident following her trip with Metze to Chicago resulted in severe

[7]Jones has argued that the district court failed to take into account sexually harassing incidents reported by other female employees. Such testimony, though relevant in a class action suit, does not bear on Jones' individual claim of sexual harassment in the absence of evidence that such incidents affected Jones' psychological well-being. We note, moreover, that the district court did not credit Jones' testimony regarding the three major sex-related incidents as factual findings. The court's ruling appears to recount these incidents only to show that, even if true, such "harassment" was insufficiently pervasive to constitute a violation of Title VII.

distress; (ii) that she was adversely affected in terms of pay and promotion; (iii) that Metze increased her responsibilities when she complained; (iv) that Metze fabricated rumors about her; and (v) that the district court erred in finding that she had admitted to not being adversely affected. We find Jones' points unpersuasive.

(1) *The Trip to Chicago.* It appears that Jones confuses tangible job detriment with distress or psychological harm, an intangible detriment. Moreover, assuming that Metze's proposition caused Jones to return to Little Rock, Arkansas, we cannot discern from the record that this incident caused a tangible job detriment to Jones. On the contrary, Jones' testimony on this point reveals no adverse employment effect.

(2) *Pay and Promotion.* While an adverse employment decision in this regard would certainly amount to a tangible job detriment, the record is barren of any indication that Jones' complaints of sexual harassment were related to her equal pay and promotion complaints. This court cannot infer such a relationship.

(3) *Increased Responsibilities.* Although Jones claims that Metze increased her responsibilities after she complained of sexually harassing conduct, and refers this court to exhibits indicating those responsibilities, neither the exhibits nor the testimony in the record establish that Jones' responsibilities increased unduly in relation to her position at Flagship, or otherwise resulted from her sexual harassment complaints.

(4) *Rumors.* Jones' contention that Metze fabricated rumors about her throughout the company is without support. Metze's cross-examination testimony reveals that he listened to, and, at most, participated in company gossip about Jones.

(5) *Jones' Admission.* According to Jones, her "admission" to not being adversely affected by the sexually harassing conduct was included in a "fabricated" report prepared by security personnel in connection with a "retaliatory investigation" conducted for the purpose of finding a "ostensible" reason for terminating her employment at Flagship. While Jones' assertion may be credible, the trial court found to the contrary. We cannot say that this determination is clearly erroneous.

b. *Quid Pro Quo*

An employer may not require sexual consideration from an employee as a *quid pro quo* for job benefits. *Henson*, 682 F.2d at 908. In *Henson* the court summarized the prima facie elements of a *quid pro quo* claim under Title VII.

> In order to establish a violation of Title VII on grounds of sexual harassment of this kind, an employee must prove a number of elements, many of which are similar to the proof required to establish the existence of a hostile or offensive work environment:
>
> (1) *The employee belongs to a protected group.*
>
> (2) *The employee was subject to unwelcome sexual harassment.*
>
> (3) *The harassment complained of was based upon sex.*
>
> (4) *The employee's reaction to harassment complained of affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment. The acceptance or rejection of the harassment by an employee must be an express or implied condition to the receipt of a job benefit or the cause of a tangible job detriment in order to create liability under this theory of sexual harassment.* As in the typical disparate treatment case, the employee must prove that she was deprived of a job benefit which she was otherwise qualified to receive because of the employer's use of a prohibited criterion in making the employment decision.
>
> (5) *Respondeat superior.*

Id. at 909 (emphasis added) (citations omitted).

As discussed above, Jones failed to demonstrate that the incidents of which she complained resulted in a tangible job detriment. Similarly, the record fails to establish that Jones was required to accept sexual harassment as a condition to the receipt of a job bene-

fit. The district court's finding that Jones failed to make out a *quid pro quo* claim for sexual harassment under Title VII is not in error.

We, therefore, affirm the trial court's ruling that Jones failed to establish her claim for sexual harassment under Title VII.

II. *Jones' Pay and Promotion Claims*

a. *Equal Pay*

[7] Jones asserts that Flagship discriminated against her in pay under both the Equal Pay Act and Title VII. The former statute provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex *by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work* on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex
>
> . . . .

29 U.S.C. § 206(d)(1) (emphasis added).

Unlike Title VII, the burden of persuasion may shift from the plaintiff to the defendant in a suit under the Equal Pay Act.

> The plaintiff's having made out a *prima facie* case has different ramifications under the Equal Pay Act than it has under the Title VII. Under the Equal Pay Act, the plaintiff has the burden of proof to "show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed

> under similar working conditions.' " *Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 2, 10 (1974). If the plaintiff meets this burden, the burden of proof "shifts to the employer to show that the differential is justified under one of the Act's four exceptions." *Id.* at 196, 94 S.Ct. at 2229, 41 L.Ed.2d at 11. The exceptions are affirmative defenses on which the employer has the burden both of production and of persuasion. *Id.* at 197, 94 S.Ct. at 2229, 41 L.Ed.2d at 11. In other words, the burden shifts to the employer once a plaintiff shows that she was paid less than a male who was performing substantially the same job.

Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1136 (5th Cir. 1983).

Thus, in order to establish a claim under the Equal Pay Act, the plaintiff must show (1) that her employer is subject to the Act; (2) that she performed work in a position requiring equal skill, effort and responsibility under similar working conditions; and (3) that she was paid less than members of the opposite sex. To establish "equal work", the plaintiff need only prove that the "skill, effort and responsibility" required in the performance of the jobs is "substantially equal." *Pearce v. Wichita County, City of Wichita Falls, Texas Hospital Bd.*, 590 F.2d 128, 133 (5th Cir. 1979). The Act necessarily requires a plaintiff to compare her skill, effort, responsibility and salary with a person who is or was similarly situated.

Jones based her pay complaints at trial on salary comparisons with four male employees whom she regarded as having comparable qualifications and responsibilities: Jared Metze, Ken Diebold, Jim Lawther and Joseph Primavera.

Metze. Jones compared her position to Metze's when the latter was "Manager of Personnel Relations" from April, 1972, to July, 1974. Metze's employee record card reveals that he earned $271.16 per week at his hire and $380.80 per week when promoted to Director of Public Affairs. Jones, meanwhile, earned $403.85 per week when hired in 1979. Thus, *assuming* that Metze's job was substantially similar to Jones' job as EEO Manager, the district court cor-

rectly concluded that Jones failed to establish that she earned less than Metze for equal work.

Diebold. Jones did not introduce Diebold's employee record card at trial. Consequently, even if the jobs of Jones and Diebold were substantially similar, Jones failed to show that she earned less than Diebold.

Lawther. Flagship hired Lawther as "Specialist in Employee Relations" three months before Jones joined the company. Lawther and Jones both started at $403.85 per week. Beginning in December, 1980, Lawther earned $20 per week more than Jones following his promotion to "Manager of Union Contract Administration." Lawther, who had been a high school teacher for 12 years, and a teachers' union representative for two years prior to his hire, was involved in collective bargaining negotiations and affirmative action programs at 46 locations. Based on our review of the record, we cannot disagree with the district court's finding that Jones and Lawther did not engage in jobs requiring "substantially equal skill, effort and responsibility."

Primavera. Jones testified that she had comparable qualifications to Primavera, one of her supervisors. However, as Jones' testimony demonstrates, Primavera's supervisory duties differed from Jones' EEO duties for the company. Although the court below did not address Jones' comparison with Primavera, we find that Jones and Primavera did not engage in substantially similar jobs.

[8] In regard to her equal pay claim under Title VII, Jones was required to show that Flagship intentionally discriminated against her on the basis of her sex.[8] Jones first testified that the company

[8]Title VII makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(a). In *County of Washington v. Gunther*, 452 U.S. 161, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981), the Supreme Court held that failure to allege or prove the equal work standard of the Equal Pay Act did not bar a plaintiff's cause of action under Title VII does incorporate that portion of the Equal Pay Act which permits dissimilar wages between men and women pursuant to (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex. *See* 42 U.S.C. § 2000e-2(h).

refused to evaluate her job performance in accordance with company policy—evaluations, according to Jones, which would have resulted in a salary raise. Flagship, on the other hand, offered evidence to show that Jones' evaluation for 1981 was postponed due to Jones' two-month absence for sick leave. Metze testified that he delayed the process in order to help Jones obtain a positive evaluation. We cannot say, based on the record before us, that Flagship's failure to evaluate Jones in 1981 constituted discrimination in pay.

Jones also testified that Flagship paid its employees at the "prevailing market rate" and that she earned less than that "rate." However, as the district court held, there is no requirement that an employer pay its employees at market rate. We must, therefore, affirm the district court's ruling that Jones failed to establish a discrimination in pay claim under either the Equal Pay Act or Title VII.

b. *Failure to Promote*

[9] In a suit alleging sex discrimination in an employer's failure to hire or promote, the plaintiff must prove the following to establish a prima facie case: (1) that she was a member of a protected group; (2) that she applied for a position for which she was qualified; (3) that she was rejected; and (4) that after she was rejected, the employer promoted, hired, or continued to seek a member of the opposite sex for the job. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Uveida v. Steves Sash & Door Co.*, 738 F.2d 1425, 1428 (5th Cir. 1984), *cert. denied*, 106 S.Ct. 791 (1986). *Plemer*, 713 F.2d at 1135. Where the plaintiff claims discrimination in promotion on the basis that jobs for which she was qualified were never posted or otherwise opened for formal applications, she must establish that the company had some reason or duty to consider her for the post. *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1133 (11th Cir. 1984).

The district court found that Jones did not submit any evidence that she applied for a position for which she was qualified and rejected, and which was later filled by a male employee. Our review of the record, moreover, discloses no evidence that Flagship had a duty or a legitimate reason to consider Jones for another position within the company. Consequently, we affirm the district court's

ruling that Jones failed to make out a discrimination in promotion claim under Title VII.

III. *Retaliation*

[10] Jones and the EEOC argue that the district court erred in concluding that Jones had failed to make out a prima facie case of retaliation under § 704(a) of Title VII.[9] A plaintiff establishes a prima facie case of retaliation by showing (1) that she engaged in activity protected by Title VII; (2) that an adverse employment action occurred; and (3) that there was a causal connection between the participation in the protected activity and the adverse employment decision. *Irby v. Sullivan*, 737 F.2d 1418, 1426 (5th Cir. 1984); *McMillan v. Rust College, Inc.*, 710 F.2d 1112, 1116 (5th Cir. 1983).

The district court found that "Jones was clearly engaging in protected activity when she filed a charge of discrimination with the EEOC [and that] [h]er subsequent suspension and termination were adverse employment actions." The court further found, however, that Flagship's actions were taken, in part, as a result of Jones' solicitation of Patricia Love, a female co-worker:

> "the evidence did establish that Jones gave aid and comfort, if not outright encouragement, to Pat Love to pursue her grievances against the company, at a time when Jones' duty was to discourage and defend such claims .... The court is persuaded, therefore, that Flagship had reasonable grounds, or in good faith thought it did ... for suspending and later terminating Jones."[10]

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[9]Section 704(a), 42 U.S.C. § 2000e—3(a), reads in pertinent part:

> "It shall be unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under this subchapter."

[10]Flagship asserted at trial that it also terminated Jones' employment for her solicitation of Dorothy Smith, another female co-worker, to sue the company, and for her breach of company policy in taking Metze's personnel file home. *See* footnote 3, *supra*. The district court found that Jones did not solicit Smith and did not breach any "clearly stated" company policy, "at least as it pertained to Jones." The court's findings in this regard are not in error.

The court ruled that, as a consequence, Jones failed to establish the causation link between the charges and Flagship's actions, "*i.e.*, that absent retaliation her employment would have continued."

We conclude that Jones did meet her prima facie burden of showing that "but for" her filing of charges with the EEOC she would not have been suspended and terminated of her employment. We conclude, however, under the *McDonnell—Burdine* allocation of burdens and order of presentation of proof in a Title VII case, that Flagship presented evidence sufficient to rebut Jones' prima facie case and to support the district court's conclusion that Flagship did not engage in unlawful retaliation.[11]

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[11]The Supreme Court has delineated the burden on a Title VII defendant in rebutting the plaintiff's prima facie case, and the plaintiff's subsequent and ultimate burden.

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. See *Sweeney, supra*, at 25, 58 L.Ed.2d 216, 99 S.Ct. 295. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.
>
> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. *See McDonnell Douglas*, 411 U.S. at 808-805, 36 L.Ed.2d 668, 92 S.Ct. 1817.

Burdine, 450 U.S. at 254-56 (footnotes omitted).

Jones and the EEOC maintain that Flagship's suspension and subsequent termination of Jones' employment were based solely on Jones' action in filing discrimination charges with the EEOC. Jones and the EEOC point out that, since Flagship was unaware of any communication between Jones and Love at the time of Jones' suspension, the district court's conclusion, *viz.*, that Flagship had "reasonable grounds, or in good faith thought it did . . . for suspending and later terminating Jones," is erroneous. While it is true that the court stated that Jones' suspension and termination were adverse employment actions, a review of the court's ruling reveals that it treated Flagship's conduct on the whole as a single adverse action. However, even if Jones' suspension is viewed as a *separate*, single adverse employment decision, as Jones and the EEOC urge, it does not follow that Flagship's action constituted unlawful retaliation.

The district court found that Jones was suspended "to avoid the conflict of interest inherent in Jones' representation of Flagship before the agency to whom she had made a complaint."[12] The EEOC contends that, notwithstanding the conflict of interest created, § 704(a) applies with equal force in protecting an employee charged with EEO responsibilities from retaliatory conduct.

We are well aware that the provisions of Title VII must be construed broadly in order to give effect to Congress' intent in eliminating invidious employment practices. *See Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1004-07 (5th Cir. 1969). Moreover, since the enforcement of Title VII rights necessarily depends on the ability of individuals to present their grievances without the threat of retaliatory conduct by their employers, rigid enforcement of § 704(a) is required. *Pettway*, 422 F.2d at 1107. *EEOC v. Kallir, Phillips, Ross*, 401 F. Supp. 66, 72 (S.D.N.Y. 1975), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

[12]Jones contends that because her duties were primarily "conciliatory" and "non-adversarial," no actual conflict of interest was created by her actions. Although Jones' duty may have been to counsel discrimination claimants and to conciliate discriminate claims in a non-adversarial manner, it was her position as a representative of the company in EEO matters, not her methods, which created the conflict of interest.

[11] In assuming her position as Flagship's Manager of EEO Programs, Jones neither abandoned her right to be free from discriminatory practices nor excluded herself from the protections of § 704(a). In filing a charge against Flagship on the ground that the company had discriminated against her in terms of pay and sexual harassment, Jones was exercising a protected right under Title VII, as the district court found. *Pettway, supra.*

[12] However, we are also well aware that, although eliminating discriminatory employment practices is the goal of Title VII, cooperation and voluntary compliance are the preferred methods of promoting that goal. *See generally, Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). An employer has a strong interest in having an opportunity to settle equal employment disputes through conference, conciliation and persuasion before an aggrieved employee resorts to a lawsuit. In *St. John v. Employment Development Dept.*, 642 F.2d 273 (9th Cir. 1981), the court noted that a conflict of interest created by an EEO employee's filing of charges with the EEOC could justify adverse employer action: "It may be that the fundamental policies of Title VII require that voluntary compliance be encouraged by allowing an employer's transfer of a complaining employee to a position without EEOC contact, but otherwise equivalent." *Id.* at 275.[13]

In the instant case Vygantas, the Flagship officer responsible for Jones' suspension and discharge, testified that he suspended Jones with pay pending reassignment and an investigation of her claims. The EEOC notes that, unlike the situation contemplated in *St. John*, Jones was never reassigned and was barred from Flagship's premises and educational seminar functions. Jones and the EEOC contend that Flagship's conduct following Jones' claims against the

[13]The Ninth Circuit grounded this possible exception to § 704(a) on the "business necessity" doctrine of *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). In *Griggs* the Supreme Court held that employment practices which are discriminatory in operation are not prohibited if the employer shows they are related to job performance, *i.e.* that they are required by "business necessity." *Id. See Prewitt v. United States Postal Service*, 662 F.2d 292, 306 (5th Cir. 1981). The Tenth Circuit has also held that business necessity may justify retaliation. *See Barela v. United Nuclear Corp.*, 462 F.2d 149, 152, n.5 (10th Cir. 1972) (apparently accepting business necessity as an appropriate defense in principle, but holding that it had not been established).

company, indicate that Flagship's sole intention was to fire Jones for exercising her rights under Title VII.

[13] We need not address ourselves to the extent to which an employer may act in relieving an employee of her EEO duties without running afoul of § 704(a), or to whether Flagship's response, if based on Jones' filing of charges *alone*, was sufficiently excessive to constitute unlawful retaliation. The record establishes that Jones' filing of charges with the EEOC was not the *sole* reason for Flagship's action at the time of suspension. Vygantas testified that he suspended Jones with pay not only for the conflict of interest stemming from her position as an EEO officer, but for Jones' plan to initiate a class action suit against the company.[14]

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[14]Vygantas' testimony reads in pertinent part:

[Direct Examination]

Q. Now, did there come to be a time where you made the determination to send Mrs. Jones home?

A. Yes.

Q. Tell me how you came to that determination.

A. If I recall the events correctly, on the 11th of February I was informed that a charge had been filed and identified what the charge was. I invited her to come up to my office, and I raised some questions about in view of the fact that she had sought a solution of her claim with the agency that she was representing Sky Chefs, I felt that that was a conflict of interest and similarly saying to her, Seems to me you have a conflict of interest on this situation. She at my perception understood that. It could be that with respect to her issues she would have a conflict of interest. *I also had been told by Mr. Metze while the charge was being filed he had a call from her attorney, Mr. Walker, who said I'd like to settle this before we file a class action suit in view of the fact of a class action suit that is beyond just her representation.*

• • •

[Cross-Examination]

Q. Let me be sure of your position on the conflict that the charge presented to you. Did you testify that you saw a basic conflict there?

• • •

A. There was a conflict in the sense that she was responsible to represent to the EEO commission and other third parties, governmental parties, Sky Chef and she had sought—she had sought an answer—I

Although we realize that the district court did not identify in its ruling Jones' conduct in this regard as a separate basis to justify Flagship's action, a review of the entire record leaves no doubt that the court considered the evidence of Jones' solicitation of Pat Love against the background of Jones' attempt to file a class action suit. Flagship's belief of Jones' plan to file a class action claim on the date of her suspension, and its subsequent belief of Jones' attempt to solicit others, including Pat Love, to sue or to join Jones in suing the company, will be discussed jointly.

Jones and the EEOC argue that the district court never found that Jones actually solicited Love, but merely that Jones "gave aid and comfort, if not outright encouragement, to Pat Love to pursue her grievances against the company at a time when Jones' duty was to discourage and defend such claims . . . ." Jones and the EEOC maintain that a company's EEO officer has no duty to discourage discrimination claims, and, moreover, is expected to give aggrieved employees "aid and comfort" as a means of conciliating discrimination disputes. While we do not take issue with Jones' conciliatory role, we view this contention as one taken out of context. It is clear from the lower court's decision, when read on the whole, that the court was referring to solicitation in the form of aid and comfort and encouragement. We will not quibble with the district court's choice of words where the meaning is apparent.

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don't know the proper legal terms for it with that very commission. So therefore, it was my judgment that she could not effectively represent the company, and in addition I was told by Mr. Metze a day or two before, even three of four days before—

Q. Was it two days before or three or four?

A. I cannot exactly tell you, but it was before. *It was before the 11th, that he had a telephone conversation with her attorney who said he would like to settle this before this develops into a class action suit.*

Q. Let me ask you this then. I thought you testified on direct that you sent her home because of the basic conflict that the charge represented. *Are you saying there were other reasons why you sent her home?*

A. *Yes, there were two reasons. . . .*

(emphasis added).

The EEOC next argues that Jones' "aid and comfort" of Love constituted lawful opposition to a "practice made an unlawful employment practice by [§ 704(a)]."[15] 42 U.S.C. § 2000e-3(a). We agree that employee opposition to discriminatory employment practices directed against a fellow employee may constitute activity protected under § 704(a). In *Berg v. LaCrosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980) the court held that it is a violation of § 704(a) to fire an employee because he opposed discrimination against a fellow employee, even if he was mistaken and there was no discrimination. *See also, Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179, 1182 (7th Cir. 1982) (holding that it is unlawful to retaliate against an individual who opposed discrimination against a co-worker).

[14] However, unlike the employees in *Berg* and *Rucker*, Jones was an employee charged with representing her company on equal employment matters. As the EEOC concedes, some conduct, even if in sincere opposition to unlawful employment practices under Title VII, may be so disruptive or inappropriate as to fall outside the protections of § 704(a). "There may arise instances where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed. In such a case, his conduct, or form of opposition, is not covered by § 704(a)." *Rosser v. Laborers' International Union, Local 438*, 616 F.2d 221, 223 (5th Cir.), *cert. denied*, 449 U.S. 886 (1980). In determining whether particular conduct constitutes activity protected under § 704(a), this circuit has required a balancing test: "[T]he courts have required that the employee conduct be reasonable in light of the circumstances, and have held that 'the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare'." *Jeffries v. Harris County Community Action Assoc.* 615 F.2d 1025, 1036 (5th Cir. 1980) (quoting *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 223 (1st Cir. 1976)). *Accord, Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

The EEOC maintains that Jones' dealings with Love did not harm Flagship. We disagree. As Flagship's Manager of EEO Pro-

[15]According to Jones, Love had also been propositioned by a male manager.

grams, Jones necessarily played a crucial role in equal employment matters involving the company. Jones knew of Flagship's position in discrimination cases filed against the company and acted as its representative before administrative agencies, including the EEOC. The need to settle discrimination claims through the process of cooperation and conciliation necessarily required Flagship to repose great confidence in its EEO personnel, in general, and Jones, in particular.

[15] Jones' action in (1) filing a discrimination suit against Flagship, (2) suggesting that a class action suit would follow, and (3) soliciting or inviting others to sue or join in a suit against the company not only rendered Jones ineffective in the position for which she was employed, but critically harmed Flagship's posture in the defense of discrimination suits brought against the company. Moreover, Jones' right to express her grievances and promote her own welfare did not depend on others joining in her suit. We conclude, therefore, that under the aforementioned "balancing test" Jones' conduct in soliciting or inviting others to join in her discrimination claim,[16] coupled with her expressed intent to serve at the vanguard of a class action suit, was not protected under § 704(a) and provided Flagship with a nondiscriminatory basis upon which to suspend and discharge Jones.

[16] Flagship, having met its burden of production by providing a legitimate, nondiscriminatory basis for its action, rebutted Jones' prima facie case and shifted the burden of persuasion to Jones to show that a discriminatory reason more likely motivated Flagship, or that Flagship's "proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. *McMillan*, 710 F.2d at 1116. The EEOC contends that the district court failed to assess whether the company's reasons were pretexts for discrimination. Specifically, the

[16]Jones and the EEOC argue that Love's testimony cannot support the conclusion that Jones solicited or encouraged Love to sue or join in suing Flagship. Although Love's testimony is not the model of clarity, it is apparent that her understanding at the time of her discussion with Jones was that the latter had asked her to "join" in Jones' claim. The court below could have properly determined that Love's understanding of Jones' request was communicated to Metze, who, in turn communicated this understanding to Vygantas. Jones' subsequent "explanation" to Love that Jones only wanted Love to testify as to her knowledge of Jones' claims came too late.

EEOC asserts that Flagship's investigation was conducted to uncover inculpatory evidence upon which to discharge Jones. According to the EEOC, the district court's finding that two of Flagship's proffered reasons—Jones' solicitation of Dorothy Smith and Jones' unauthorized use of Metze's personnel file—were not supported by the record, and Love's "confused" testimony, demonstrate the absence of any non-retaliatory motive.

[17] The EEOC's point misses the mark. As discussed above, the court below was entitled to credit Love's testimony as supporting Flagship's position that Jones had engaged in solicitation, which, if true, would have jeopardized the company's posture with respect to defending discrimination claims. Moreover, Flagship need not have been correct in its basis for suspending and discharging Jones to show that its actions were motivated for non-retaliatory reasons. *See, e.g., De Anda v. St. Joseph's Hospital*, 671 F.2d 850, 854, n.6 (5th Cir. 1982) ("Whether St. Joseph was wrong in its determination that she should have checked is irrelevant, as long as its belief, though erroneous, was the basis for the termination"); *Dickerson v. Metropolitan Dade County*, 659 F.2d 574, 581 (5th Cir. 1981) (Unit B) ("Even if DERM were wrong in its evaluation of the seriousness of the injury and the justifiability of the absences, it did not violate Title VII if it acted on the reasonable belief about the absences"). *Accord Jeffries, supra.* It is sufficient, as the district court held, that "Flagship had reasonable grounds, or in good faith though it did," for its suspension and termination of Jones' employment.[17]

[18] We hold that, although Jones did establish a prima facie case of unlawful retaliation under § 704(a), *i.e.*, that but for her filing of charges with the EEOC she would not have been suspended and fired, Flagship presented sufficient, credible evidence to show that its actions were motivated by non-retaliatory reasons, and therefore, to rebut Jones' case. We hold, furthermore, that Jones failed to show that Flagship's reasons were a pretext for discrimination. Accordingly, we affirm the district court's ruling that Jones failed to establish that Flagship engaged in unlawful retaliation under § 704(a).

---

[17]Jones and, to a lesser extent, the EEOC assert that the district court created, in effect, a "good faith" exception to § 704(a) in its ruling. This argument is also taken out of context. In using the term "good faith," the court merely denoted that Flagship had a reasonable belief that Jones had solicited Love.

IV. *Jones' Additional Claims*

[19] Jones complains that the district court abused its discretion in denying her leave to amend her complaint 15 months after commencement of this case. Such a ruling is within the sound discretion of the trial court and, given the late date of Jones' motion, was not inappropriate.

CONCLUSION

In sum, we conclude that Jones failed to show that the sexually harassing conduct complained of resulted in a tangible job detriment or affected a term, condition or privilege of employment to a degree sufficient to establish a sexually abusive or hostile work environment. We hold, therefore, that Jones failed to establish a prima facie case of sexual harassment under Title VII and affirm the district court's ruling in this respect. We also conclude that Jones failed to demonstrate (1) that she earned less than male employees for substantially equal work; (2) that Flagship intentionally discriminated against her in terms of pay; and (3) that Flagship either rejected her application for another position, or failed to advise her of an opening for which she was qualified. Accordingly, we hold and affirm the district court's ruling that Jones failed to establish disparate treatment in terms of pay and promotion under Title VII and the Equal Pay Act.

Finally, we conclude that, although Jones did establish a prima facie case of unlawful retaliation under § 704(a) of Title VII, under the *McDonnell-Burdine* allocation of burdens and order of presentation of proof, Flagship sufficiently rebutted Jones' case by adducing evidence that is suspended and fired Jones for non-retaliatory reasons. Moreover, we find that Jones did not demonstrate that the reasons proffered by Flagship were pretexts for discrimination. We, therefore, hold that Jones failed to show that Flagship engaged in unlawful retaliation under Title VII, and affirm the district court's ruling in this regard.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-1124

B. T. JONES,

Plaintiff-Appellant,

versus

FLAGSHIP INTERNATIONAL, A DELAWARE CORPORATION D/B/A SKY CHEFS,

Defendant-Appellee.

Appeal from the United States District Court

for the Northern District of Texas

ON PETITION FOR REHEARING

(August 21, 1986)

Before GEE, RUBIN, and GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

denied.

ENTERED FOR THE COURT:

s/_____
United States Circuit Judge

IN THE UNITED STATES DISTRICT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

B. T. JONES, Plaintiff, VS. FLAGSHIP INTERNATIONAL, a Delaware Corporation, d/b/a SKY CHEFS, Defendant.	CIVIL ACTION NO. CA 3-82-1611-G

MEMORANDUM OF DECISION

Introduction

1. This is a race and sex discrimination case brought by Benita J. Jones ("Jones") under 42 U.S.C. §2000e et seq. ("Title VII"), 29 U.S.C. §206(d) ("the Equal Pay Act"), and 42 U.S.C. §1981 ("§1981"). After bifurcation of liability and remedy issues, Fed. R. Civ. P. 42(b), the liability phase of the case was tried to the court on March 12-15, 1984, and the

court makes the following findings and conclusions in connection therewith.

Factual Background

2. Jones, a black female citizen of the United States and resident of Dallas, Texas, was employed by Flagship at its headquarters office in Arlington, Texas from July 30, 1979 to April 15, 1982.

3. Flagship is a Delaware corporation doing business in the Northern District of Texas.

4. At all times material to this action, Flagship was engaged in an industry affecting commerce and employed 15 or more employees each working day in each of 20 or more calendar weeks in the then current or preceding calendar year. Flagship is thus an employer within the meaning of Title VII and the Equal Pay Act.

5. The court has jurisdiction over

the subject matter and the parties.

6. After her admission to the Arkansas bar in 1976, Jones worked in the city attorney's office in Little Rock and as an attorney for the Arkansas Department of Aging before her employment at Flagship as manager of Equal Employment Opportunity ("EEO") programs.

7. As manager of EEO programs, Jones' principal duties were to prepare an affirmative action plan and to investigate charges of employment discrimination brought against the company. She also represented the company before various administrative agencies, state and federal, to defend or conciliate such charges, but she had no responsibility to litigate them in court.

8. Jones' initial salary was $21,000. About November 11, 1979, her salary was increased to $22,050 annually

and, following a change of job grades, it was increased again on June 8, 1980 to $23,153 per year. On August 29, 1980, Jones received what was to be her last pay increase - to $27,000 - before leaving Flagship's employ.

The Title VII Claims - Burden of Proof

9. In a suit arising under Title VII, although the elements of each claim may differ, the ultimate burden rests upon the plaintiff to prove unlawful discrimination by a preponderance of the evidence; that burden of persuasion never shifts to the defendant. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253-55 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24, 25 (1978).

10. If the plaintiff makes out a prima facie case under Title VII, the defendant's burden is not then one of

proof, but rather of coming forward with admissible evidence that the employment actions complained of were taken for legitimate, nondiscriminatory reasons. Burdine, 450 U.S. at 254-55.

11. If the defendant carries this burden of production, the presumption of discrimination raised by the prima facie case is rebutted; the defendant need not persuade the court that it was actually motivated by the reasons advanced. Burdine, 450 U.S. at 254.

12. The plaintiff still has the opportunity to demonstrate that the reasons advanced by defendant are mere pretext and do not represent the true motivation. Burdine, 450 U.S. at 256; McDonnell Douglas Corporation v. Green, 411 U.S. 792, 804 (1973). This burden merges with the plaintiff's ultimate burden of persuading the court that she

has been the victim of discrimination, either by demonstrating directly that a discriminatory reason was the likely motivation or indirectly by showing the legitimate, nondiscriminatory reasons advanced by the employer are not credible (i.e., they are probably pretextual). Burdine, 450 U.S. at 256. See also Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 564 n. 9 (5th Cir. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 2658 (1984).

13. Jones' claims under Title VII allege "disparate treatment": i.e., she claims that Flagship treated her less favorably than others because of her sex and race. The factual inquiry in a disparate treatment case under Title VII is "whether the defendant intentionally discriminated against the plaintiff." In other words, is "the employer . . .

treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'" United States Postal Service Board of Governors v. Aikens, ___ U.S. ___, 103 S.Ct. 1478, 1482 (1983).

14. Jones alleges that she was discriminated against on racial or sexual grounds by means of (1) sexual harassment, (2) retaliation for filing an EEOC charge, (3) unequal pay, and (4) failure to promote. Although the precise elements of a plaintiff's prima facie case differ depending upon the claim, the essential showing which Jones must make is that she was treated differently from similarly situated individuals, and that a causal relationship existed between her sex (or race) and the adverse employment decision. Furnco Construction Corporation v. Waters, 438 U.S. 567, 575-77 (1978).

15. Jones failed to make out even a prima facie case of discrimination on grounds of race. She was hired at Flagship by Jarred Metze, a black male who had performed EEO duties in the early 1970's. Many of Jones's complaints of discrimination were directed at the conduct of Metze. As manager of EEO programs, Jones succeeded Catherine Sharp, another black female. There is not the slightest hint that race was ever a factor in any of Flagship's employment decisions regarding Jones. Although Jones placed great stress on the small number of blacks and females in upper management at Flagship, that evidence was inconclusive without a demonstration that those numbers were disproportionate to the pool of available qualified personnel from which such management was drawn. See, e.g., Lindsey v. Southwestern Bell Telephone

Company, 546 F.2d 1123, 1124 (5th Cir. 1977); Hill v. K-Mart Corporation, 699 F.2d 776, 780-81 (5th Cir. 1983).

16. Since most of Jones' complaints are grounded on sexual discrimination, and since the elements of a prima facie case vary depending on the means by which such discrimination was allegedly practiced, these claims, and the evidence pertaining to them, will be discussed separately in the following sections.

Sexual Harassment

17. According to Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982), a plaintiff may make out a claim of sexual harassment under Title VII by showing either a hostile work environment or a quid pro quo.

18. To show a hostile work environment, Jones has to prove the following elements:

(a) that she belonged to a protected group;

(b) that she was subject to unwelcome sexual harassment;

(c) that the harassment complained of was based upon sex;

(d) that the harassment complained of affected a "term, condition, or privilege" of employment; and

(e) respondeat superior, i.e., that Flagship knew or should have known of the hostile work environment created by Jones' supervisor or co-workers but failed to take prompt remedial action.

Id. at 903-05.

19. Jones testified at trial about three discrete incidents which she contends to be evidence of a hostile work environment. The first occurred only six weeks after she joined Flagship when she and her supervisor, Jarred Metze, were returning from a business trip to Detroit.

While Metze was driving her home from the Dallas airport, Jones was complaining about the security of their lodgings in Chicago. Metze replied that his wife did not yet know he was back in town and that he would take Jones to a reputable hotel. When Jones asked what he meant, he said she needed "the comfort of a man." Jones was so distressed by this occurrence that she left for Little Rock the next day. She stayed there two weeks and returned only upon Metze's promise that it wouldn't happen again.

20. The second incident occurred several months later when Jones and Metze were traveling together to Denver and San Francisco. Metze introduced her to a male friend and later told her that she was "off the hook" because of his friend's interest in her, to which Jones responded that she was off limits to Metze in any

event.

21. The third incident, which was alleged in detail in þ7(e) of plaintiff's complaint, occurred during the headquarters office Christmas party in December, 1981. On that occasion, figures of mermaids with bare breasts, which had been created by Kurt Elmer, the company's executive chef, were used as table decorations. As soon as she saw them, Jones told Metze that these statutes would create problems for female employees. To avoid upsetting Elmer during the party, Metze proposed that Jones write Elmer a memo. Jones later wrote such a memo, expressing the distaste of female employees for the figures, and received in reply a short polemic from an obviously unrepentant Elmer.

22. In addition to these specific incidents, Jones testified generally that

Metze often leered at her in his office after she finished presentations, that he frequently called her at home, and that he tried to make her think she was obliged to spend time with him after hours.

23. As described in Henson, 682 F.2d at 903, the Equal Employment Opportunity Commission ("EEOC") has issued regulations defining sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. §1604.11(a) (1981).

24. The court is of the opinion that, under Henson and the relevant EEOC regulations quoted above, Jones failed to

establish a hostile work environment. "For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." Henson, 682 F.2d at 904. The sporadic incidents recounted by Jones, occurring at three different times over the course of Jones' two and one-half years' employment, hardly qualify as pervasive. Indeed, one of them -- the mermaid incident -- may not even have a sexual meaning at all. It may just as well be a disagreement over artistic taste. Jones indicated that was her personal opinion in a subsequent handwritten note to Elmer (PX 35 and DX 28). At all events, Jones never demonstrated that she was adversely affected in her employment by a hostile work environment, i.e., that it altered

the conditions of her employment. To the contrary, Flagship offered evidence at trial that Jones admitted, during its investigation of her allegations of sexual harassment, that she had not been adversely affected. This evidence was never contradicted and the court finds it persuasive.

Quid Pro Quo

25. Since an employer may not require sexual consideration from an employee as a quid pro quo for job benefits, Henson, 682 F.2d at 908, a Title VII plaintiff may also make out a claim of sexual harassment by showing (a) that she belonged to a protected group; (b) that she was subject to unwelcome sexual harassment; (c) that the harassment complained of was based upon sex; and (d) that the employee's reaction to the harassment complained of affected tangible

aspects of the employee's compensation, terms, conditions, or privileges of employment. Id. at 909.

26. The proof in support of these elements, already discussed under the hostile work environment theory, is similarly deficient to support a quid pro quo claim. Jones failed to show that the incidents of which she complained affected tangible aspects of her job in any way. In fact, she admitted to the American Airlines' Security Department investigators that they did not. For these reasons, Jones has failed to establish sexual harassment under Title VII on a quid pro quo theory.

Retaliation

27. A plaintiff establishes a prima facie case of retaliation by showing (a) that she engaged in an activity protected by Title VII; (b) that an adverse

employment action occurred; and (c) that there was a causal connection between the participation in the protected activity and the adverse employment decision. Irby v. Sullivan, 737 F.2d 1418, 1426 (5th Cir. 1984).

28. Jones was clearly engaging in protected activity when she filed a charge of discrimination with the EEOC. Her subsequent suspension and termination were adverse employment actions. The question for decision, then, is whether the filing of discrimination charges caused Jones' suspension and later discharge.

29. To prove that causation element in this circuit, the alleged discriminatee in a Title VII case must show that she would not have been discharged absent the forbidden motive -- i.e., retaliation against her protected act. Unless Jones establishes that without this retaliation

her employment would have continued, she is not entitled to recover. Jack v. Texaco Research Center, 743 F.2d 1129, 1130 (5th Cir. 1984).

30. Flagship asserts that Jones was suspended with pay to avoid the conflict of interest inherent in Jones' representation of Flagship before the agency to whom she had made a complaint. It further asserts that she was later terminated for violating company rules when she removed a confidential personnel file from company premises and when she breached her duty of undivided loyalty to Flagship by soliciting two female employees to sue the company for employment discrimination.

31. The court is not convinced that Jones breached company policy when she took Metze's personnel file home. Any such company policy was not clearly

stated, at least as it pertained to Jones. On the other hand, the evidence did establish that Jones gave aid and comfort, if not outright encouragement, to Pat Love to pursue her grievances against the company, at a time when Jones' duty was to discourage and defend such claims (the evidence failed to establish, however, that Jones solicited or encouraged Dorothy Smith to sue Flagship). The court is persuaded, therefore, that Flagship had reasonable grounds, or in good faith thought it did, see Dickerson v. Metropolitan Dade County, 659 F.2d 574, 581 (5th Cir. 1981); DeAnda v. St. Joseph Hospital, 671 F.2d 850, 854 n. 6 (5th Cir. 1982) for suspending and later terminating Jones. Thus, Jones has failed to show the causative link between her charges and termination, i.e., that absent retaliation her employment would have continued.

Failure to Promote

32. To establish prima facie case of disparate treatment in promotion, a plaintiff must show: (a) membership in a protected group; (b) an application for an open job for which he or she was qualified; (c) rejection; and (d) action by the employer in promoting or hiring a nonminority for the job or in continuing to seek nonminority applicants for that job. Uviedo v. Steves Sash & Door Company, 738 F.2d 1425, 1428 (5th Cir. 1984).

33. Jones did not present evidence that she ever applied for a specific job opening for which she was qualified nor that Flagship hired a nonminority for such opening.

34. Moreover, the scope of Jones' administrative charges, as amended, did not fairly encompass a claim of failure to

promote. See Sanchez v. Standard Brands, Inc., 431 F.2d 455, 465-67 (5th Cir. 1970) (Title VII clearly contemplates that no issue will be the subject of a civil action until the EEOC has first had the opportunity to attempt to obtain voluntary compliance). See also Vuyanich v. Republic National Bank of Dallas, 723 F.2d 1195, 1199 (5th Cir. 1984) (plaintiff's claims should be limited to those contained in EEOC complaint.)

Equal Pay Act Claim

35. Jones rests her claim that she was the victim of discrimination in pay on both the Equal Pay Act and Title VII. The court will therefore discuss them separately in that sequence.

36. In a suit arising under the Equal Pay Act, a plaintiff bears the burden of proving by a preponderance of the evidence that (1) plaintiff was

employed by an employer subject to the Act; (2) plaintiff performed work in a position requiring equal skill, effort and responsibility under similar working conditions; and (3) plaintiff was paid less than members of the opposite sex performing such work employed in the same establishment. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

37. To establish "equal work," the plaintiff need not prove that the duties performed are identical, but merely that the "skill, effort and responsibility" required in the performance of the jobs is "substantially equal." Pearce v. Wichita County, City of Wichita Falls, Texas, Hospital Board, 590 F.2d 128, 133 (5th Cir. 1979).

38. The employees whose pay is the subject of comparison may hold jobs in succession as well as simultaneously.

Pearce, 590 F.2d at 133; Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1049 (5th Cir.), cert. denied, 414 U.S. 822 (1973).

39. Jones compared her pay and job with those of three male employees: Jared Metze, Ken Diebold, and Jim Lawther. Assuming that Metze's job when he was Manager of Personnel Relations was substantially similar to Jones', i.e., that it called for substantially equal skill, effort and responsibility, Jones failed to show that she was paid less than Metze. A comparison of the employee record cards of Metze and Jones demonstrates that from his hire in April 1972 until July 1974, when Metze left his position as Manager of Personnel Relations to become Director of Public Affairs, he earned less per week than the $403.85 salary at which Jones started in 1979. At his hire Metze earned $271.16 per week and

was earning $380.80 when promoted in July 1974. Accordingly, the court find that Jones failed to establish that she was paid less than Metze for equal work.

40. Diebold testified that after two years with the company, he became Manager of Employee Relations in 1976, a position he held until 1981. Diebold did not testify concerning his salary level in that capacity, however, and Jones did not introduce his employee record card at trial. As a result, even if it is assumed that the jobs of Jones and Diebold were substantially similar, Jones failed to prove the third element of an Equal Pay Act claim as set forth in Corning Glass Works v. Brennan, 417 U.S. at 195.

41. Lawther was hired as Specialist in Employee Relations in 1979, three months before Jones joined Flagship. Lawther started as a grade 35 at $403.85

per week, the same salary at which Jones started as a grade 37. Lawther was a high school teacher for 12 years prior to his hire.

42. From 1979 on, Lawther's salary and Jones' moved slowly upward together until Lawther jumped ahead by $20 a week in December of 1980, upon his promotion to Manager of Union Contract Administration, increasing his job grade to a 65, while that of Jones remained at grade 66.

43. Lawther was involved in the collective bargaining process and affirmative action plans at 46 locations, where he could put to work the experience gained as his teachers' union representative for two years. Neither Lawther nor Jones had any supervisory responsibilities during the period in question.

44. The proof did not show that the

second and third elements of an Equal Pay Act claim vis-a-vis Lawther were satisfied. The court finds that the jobs of Jones and Lawther were not shown to "require substantially equal skill, effort and responsibility." Moreover, until December of 1980, Lawther and Jones received approximately the same pay. When Lawther was promoted at that time, he moved slightly ahead of Jones in remuneration, but he did not move ahead significantly until March 1982, after Jones had been suspended. The court declines to speculate whether Jones would have kept up with Lawther's March 1982 pay increase if she had not been suspended. In consequence, the evidence did not show that Jones was paid less for performing work substantially similar to Lawther's.

Title VII Pay Claim

45. As part of her claim under Title

VII, Jones alleges that Flagship discriminated against her on the basis of race or sex by paying her less than her predecessor, Metze, or her fellow workers, Diebold and Lawther. As discussed in relation to her claim under the Equal Pay Act, Jones did not present evidence to support her contention that she was paid significantly less than those individuals.

46. Jones also offered evidence to show that she was paid less than the "prevailing market rate." The Court has found no law mandating that an employer compensate its employees at such a rate. For these reasons, Jones claim of discrimination in pay under Title VII must be denied.

The §1981 Claim

47. Because §1981 proscribes only racial discrimination, Jones' claims of sexual discrimination are actionable only

under Title VII, Bobo v. ITT, Continental Baking Co., 662 F.2d 340, 344 (5th Cir. 1981), cert. denied, ____ U.S. _____, 102 S.Ct. 1985 (1982), and are not a basis for relief under §1981.

48. In view of the court's determination that Jones failed to make out a claim of racial discrimination (þ15 above), §1981 affords her no relief.

49. In addition, the court need not consider Jones' claim to relief under §1981 as an alternative to those rights contained in Title VII because Jones has not argued that any violation of §1981 can be made out on grounds different from those available under Title VII. See Page v. U.S. Industries, Inc., 726 F.2d 1038, 1041 n. 2 (5th Cir. 1984). The elements of claims brought under §1981 parallel those of claims brought under Title VII. See Rivera v. City of Wichita Falls, 665

F.2d 531, 534 n. 4 (5th Cir. 1982).

50. For all of the above reasons, Jones is entitled to no relief under §1981.

Relief for Jones

51. In light of the court's determination that Jones failed to prove that Flagship intentionally discriminated against her in the employment relationship on the basis of race or sex, the second phase of this bifurcated trial (the question of appropriate relief) need not be reached.

Flagship's Claim for Attorney's Fees

52. Although Jones was unsuccessful in her claims, the court is of the opinion that her action was not frivolous, unreasonable, or without foundation. Accordingly, Flagship is not entitled to recover attorney's fees. Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421

1978).

Conclusion

53. Judgment on the merits should be entered for Flagship.

January 24, 1985.

A. JOE FISH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

B.T. JONES,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO.
VS.	)	
	)	CA 3-82-1611-G
FLAGSHIP INTERNATIONAL, Delaware Corporation, d/b/a SKY CHEFS,	)	
	)	
Defendant.	)	

JUDGMENT

In accordance with the memorandum of decision of this date, it is ORDERED, ADJUDGED and DECREED that plaintiff take nothing, that her claims are dismissed on the merits, and that defendant recover all costs of court except attorney's fees.

January 24, 1985.

A. JOE FISH
United States District Judge

Supreme Court, U.S.
FILED
DEC 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-865

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BENITA T. JONES

Petitioner,

v.

FLAGSHIP INTERNATIONAL, d/b/a SKY CHEFS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, FLAGSHIP INTERNATIONAL, d/b/a SKY CHEFS, IN OPPOSITION TO PETITION

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Counsel for Respondent

QUESTIONS PRESENTED

I. Does Section 704(a) of Title VII of the Civil Rights Act of 1964 permit an employer to discharge an employee, whose duties include representing it in EEO matters, because that employee engaged in activity that was clearly not protected under Section 704(a).

II. Did the Court of Appeals apply the correct legal standard in reviewing the trial court's decision when the petitioner failed to present any direct evidence of discrimination and when the petitioner failed to show that the respondent's non-retaliatory reasons for its actions were a pretext for discrimination.

LIST OF PARTIES

The Petitioner is Benita T. Jones.

The Respondent is Flagship International, d/b/a Sky Chefs.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-865

BENITA T. JONES,

Petitioner,

v.

FLAGSHIP INTERNATIONAL, d/b/a SKY CHEFS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT, FLAGSHIP INTERNATIONAL, d/b/a SKY CHEFS, IN OPPOSITION TO PETITION

Respondent, Flagship International, d/b/a Sky Chefs ("Sky Chefs"), submits this brief in opposition to the petition for certiorari filed by Benita T. Jones ("petitioner").

STATEMENT OF THE CASE

Sky Chefs adopts the statement of the case as contained in the opinion of the Court below.

SUMMARY OF PETITION

The petitioner here raises two issues, neither of which are meritorious. First, the petitioner, in a mischaracterization of the opinion below, claims that the Court of Appeals held that

42 U.S.C. Section 2000e, *et seq.*, (hereinafter "Title VII"), and in particular Section 704(a) of Title VII, permits an employer to discharge an employee, whose duties include representing it in EEO matters, solely because the employee filed a charge of discrimination with the EEOC and otherwise engaged in activities protected by Title VII. Second, the petitioner claims that the Court of Appeals applied an incorrect legal standard in affirming the trial court's decision. At least, those are the questions listed by the petitioner as being presented by her petition. However, an examination of the argument contained in the petition shows that the only issue briefed by the petitioner is whether or not the Court of Appeals applied the correct legal standard in affirming the decision of the trial court. In this regard, the petitioner claims that the decision of the Court of Appeals is in conflict with a decision of this Court and a decision of the Eleventh Circuit.

SUMMARY OF ARGUMENT

The decision below is fully consistent with the decisions of this Court and with every relevant Court of Appeals decision addressing the issues presented. Accordingly, the petition fails to satisfy this Court's traditional criteria for review.

While the petitioner contends that the Fifth Circuit held that Section 704(a) of Title VII permits an employer to discharge an employee whose duties include representing it in EEO matters solely because the employee filed a charge of discrimination with the EEOC and otherwise engaged in activities protected by Title VII, even a cursory examination of the opinion below shows that the Fifth Circuit decided, rather, that the petitioner had engaged in conduct that was clearly unprotected by Section 704(a) of Title VII, which such conduct justified her suspension and discharge.

Further, the petitioner represents to the Court that the Fifth Circuit applied an incorrect standard in reviewing the decision of the trial court because she presented direct evidence of a statutory violation by Sky Chefs; thus, the petitioner argues that the Fifth Circuit incorrectly applied the standards of this Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973) and *Texas Dept. of Comm. Affairs v. Burdine,* 450 U.S. 248 (1981). Again, the petitioner has mischaracterized, if not misstated, the holding of the Fifth Circuit. An examination of the opinion below shows that the petitioner presented no direct evidence of a statutory violation, but rather, she depended upon inferential evidence to establish a *prima facie* case of retaliation, in response to which Sky Chefs presented legitimate, nondiscriminatory reasons for its action, thereby shifting the burden of persuasion to petitioner to show that a discriminatory reason more likely motivated Sky Chefs or that Sky Chefs' proffered explanation was unworthy of credence. The petitioner failed to do so, and thus the Fifth Circuit affirmed the decision of the trial court.

REASONS FOR DENYING THE WRIT

The issues presented by the petitioner do not satisfy this Court's traditional criteria for certiorari, inasmuch as the Fifth Circuit's decision is fully consistent with every relevant decision addressing the issues presented.

A. The Petitioner's Conduct Was Not Protected

Contrary to the petitioner's bald assertion that, "[i]t is undisputed that the reasons for the adverse action taken against petitioner . . . come within the scope of activity protected by the statute," an examination of the opinion below shows that the Fifth Circuit held that the petitioner's conduct in soliciting or inviting others to join her in her discrimination

claim, coupled with her expressed intent to serve at the vanguard of a class action suit, was not protected under Section 704(a) and provided Sky Chefs with a nondiscriminatory basis upon which to suspend and discharge the petitioner. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d 714, 728 (5th Cir. 1986). In arriving at this conclusion, the Court below indulged in a balancing test requiring (1) that the employee conduct be reasonable in light of the circumstances and (2) that the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his own welfare. *Id.* at 728. In applying this test, the Fifth Circuit found that the petititoner's conduct in filing a discrimination suit against Sky Chefs, suggesting that a class action suit would follow, and soliciting or inviting others to sue or join in a suit against Sky Chefs not only rendered the petitioner ineffective in the position for which she was employed, but critically harmed Sky Chefs' posture in the defense of discrimination suits brought against the company. *Id.* at 728.

The petitioner has failed to cite any authorities with which she claims the opinion below is in conflict. The reason for the petitioner's failure to do so is simple — there are none. Rather, the opinion below is fully consistent with the relevant decisions addressing the issue presented. For example, in *Smith v. Singer Co.*, 650 F.2d 214 (9th Cir. 1981), the Court upheld the grant of a summary judgment to an employer who had discharged a company EEO official who had surreptitiously filed class action discrimination charges on behalf of others. The Ninth Circuit affirmed on the grounds that the plaintiff had "thereby placed himself in a position squarely adversary to his company" and had "thus rendered himself unable to fulfill the functions of his office." The rationale of the Court in *Singer* for imposing special limitations on the right of EEO representatives to assert third-party claims against their employer was

two-fold. First, focusing on the employee's obligations, the Court noted at p. 217:

> The [EEO] position was unique in that it required the occupant to act *on behalf* of his employer in an area where normally action against the employer and on behalf of the employee is protected activity.

As to the second basis for its decision, the Court expressed its concern that if Section 704 were construed to immunize an EEO officer

> to take such action against the company he represents in support not of his own rights but of the perceived rights of those with whom it is his duty to deal on behalf of his company . . . it would render . . . wholly unworkable the program of voluntary compliance which appellant was employed to conduct *Id.* at 217.

The rule announced in *Singer* is an application to the specific circumstances of EEO representatives of the general approach adopted by courts, including the Court below, that not all forms of employee protest or opposition are protected under Section 704:

> Rather, the courts have required that the employee conduct be reasonable under the circumstances, and have held that the employer's right to run his business must be balanced against the rights of the employee to express his grievances and promote his welfare.

Jefferies v. Harris Cty. Comm. Action Ass'n., 615 F.2d 1025, 1036 (5th Cir. 1980), *quoting, Hochstadt v. Worcester Found. for Experimental Biology,* 545 F.2d 222, 233 (1st Cir. 1976).

Employing this balancing test, the Court in *Singer* concluded that throwing the mantel of protection of Section 704

over the EEO representative's efforts to assert claims of others against his employer would not only countenance a breach of the employee's duties, but would also have had a deleterious effect on the achievement of the important purposes of Title VII.

The proper functioning of the framework of Title VII is dependent on the free flow of information between company operating personnel and its representatives in EEO matters. This is so because Title VII places heavy emphasis on voluntary compliance for achieving the goal of equal employment opportunity. *See generally, Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44-45 (1974). This purpose is best served by encouraging corporate decision-makers to be frank and to fully inform their EEO representatives of the circumstances surrounding the action complained of by employees filing charges of discrimination. How else could that representative determine the viability of the company's position in a particular case? Further, one could hardly expect operating management to heed the advice of the company's EEO personnel on compliance matters if, having been entrusted with the protection of the company from legal liability, these same people were free to use what they have learned to the employer's detriment by serving as the focal point for a multiparty action against the employer. The conciliation process and the compelled conformance with the law upon which Title VII so heavily relies would be severely impaired by such a lack of confidence in EEO personnel. *Smith v. Singer Co.*, 650 F.2d at 217; *St. John v. Employment Dev. Corp.*, 642 F.2d 273, 275 (9th Cir. 1981); *Pendleton v. Rumsfeld*, 628 F.2d 102, 108 (D.C. Cir. 1980).

Other cases which have considered attempts by EEO officers to take actions on behalf of third parties against their employer's interests have found such conduct to fall outside the protection of Section 704. In *Whatley v. Metropolitan Atlanta*

Rapid Transit Authority, 632 F.2d 1325 (5th Cir. 1980), the court held that the EEO officer had been properly discharged for filing a charge of discrimination on behalf of another employee in a manner contrary to the employer's instruction. In *Pendleton v. Rumsfeld*, 628 F.2d at 102, the Court affirmed a judgment approving the removal of EEO officers who had participated in an employee protest. The Court reasoned that by taking part in the demonstration, the employees had engaged in conduct inconsistent with their duties because they had "... fatally compromised their ability to gain the confidence of middle management," thereby reducing their ability to achieve the voluntary compliance so heavily relied upon by Title VII. *Id.* at 108.

Lastly, in *Hamm v. Members of Bd. of Regents of the State of Fla.*, 708 F.2d 647, 653-654 (11th Cir. 1983), the Eleventh Circuit, emphasizing the duty of loyalty owed to the employer, affirmed the district court's judgment that the employer had properly removed an EEO specialist who, through a variety of actions, had sought to function as an advocate on behalf of "aggrieved employees," stating that:

> An employer may remove any employee from a position similar to that at issue here without violating Title VII based on the manner in which the employee undertakes his or her duties.

In sum, the decision below is fully consistent with other decisions addressing the issue of the type of conduct that is and is not protected under Section 704.

B. The Court Below Utilized the Proper Standard in Examining the Decision of the District Court

Next, the petitioner claims that the Court below utilized an improper standard in reviewing the decision of the trial

court. The petitioner's argument is as follows: she claims that she presented direct evidence of a statutory violation by Sky Chefs and that therefore, the test for the marshaling of proof as announced by this Court in the *McDonnell Douglas* and *Burdine* context is inappropriate. Instead, the petitioner argues that Sky Chefs should have been required to prove that it would have suspended and discharged Jones even in absence of her so-called proof of a direct statutory violation, citing this Court's opinions in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111 (1985) and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274 (1977). However, an examination of the opinion below and the record shows that there was no direct evidence of a statutory violation by Sky Chefs in suspending and terminating the petitioner from her employment.

First, the petitioner incorrectly argues that her suspension and subsequent termination were based solely upon her action in filing charges of discrimination with the EEOC, but the opinion below flatly refutes that contention. The petitioner also seems to urge that her suspension and termination should be reviewed as separate adverse employment decisions. As the Court below stated, the trial court treated Sky Chefs' conduct on the whole as a single adverse action. Sky Chefs believes that this was appropriate inasmuch as the petitioner's conduct amounted to a single act, involving three elements: (1) the filing of the charge, (2) suggesting that a class action would follow and (3) soliciting or inviting others to sue or join in a suit against Sky Chefs. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 728. However, the Fifth Circuit noted that if the petitioner's suspension was viewed as a separate, single adverse employment decision, it does not follow that Sky Chefs' action constituted unlawful retaliation. *Id.* at 725. Given Jones' position as manager of EEO programs, Sky Chefs believes that her suspension with pay may well have been justified on the basis of her filing charges alone, in order to

avoid the conflict of interest inherent in Jones' representation of Sky Chefs before the agency to whom she had made the complaint. *See, St. John v. Employment Dev., Corp.,* 642 F.2d at 273; *Barela v. United Nuclear Corp.,* 462 F.2d 149, 152 n.5 (10th Cir. 1972); *see also, Hamm v. Members of Bd. of Regents of the State of Fla.,* 708 F.2d at 647; *Smith v. Singer Co.,* 650 F.2d at 214; *Jefferies v. Harris Cty. Comm. Action Ass'n.,* 615 F.2d at 1025; *Whatley v. Metropolitan Atlanta Rapid Transit Authority,* 632 F.2d at 1325. However, the Fifth Circuit did not find it necessary to decide the extent to which an employer may act in relieving an employee of her EEO duties without running afoul of Section 704(a) or whether Sky Chefs' response, if based on the petitioner's filing of charges alone, was sufficiently excessive to constitute unlawful retaliation, because the record established that the petitioner was suspended *with pay,* "not only for the conflict of interest stemming from her position as an EEO officer, but for [her] plan to initiate a class action suit against the company."[1] *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 726. In this regard, the evidence is absolutely clear that on February 11, 1982, when Vygantas, the officer responsible for the petitioner's suspension and discharge, learned of the petitioner's filing of her charge of discrimination, he also knew of her threat to file a class action against the company; and he suspended the petitioner the next

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[1] At page 16 of her petition, the petitioner maintains that the Court below made an independent review of the evidence and made a finding that one of the reasons for the petitioner's suspension and termination was the threat of a class action. This representation is totally fallacious. The evidence with regard to the petitioner's threat to file a class action was undisputed. Thus, the trial court was not required to make a fact finding in this connection, and the Court below was entitled to consider this undisputed evidence just as much as the trial court. *King v. Commissioner of Internal Revenue,* 458 F.2d 245 (6th Cir. 1972); *Matter of Legel, Braswell Gov't. Sec. Corp.,* 648 F.2d 321, 326 n. 8. (5th Cir. 1981).

day. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 717 and 726-727 n. 14. Vygantas' testimony is equally clear that he suspended the petitioner for the combination of the two reasons. Certainly these acts rendered the petitioner ineffective in the position for which she was employed.

The fallacy of the petitioner's argument is that she tries to separate the two actions that she made simultaneously and then claim that one was protected, and thus bring herself within the purview of this Court's decisions in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. at 111 and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. at 274. While the petitioner attempts to separate her two actions that led to her suspension, they are in fact inseparable.[2] It should also be borne in mind that the trial court found that Sky Chefs "had reasonable grounds, or in good faith thought it did . . . for suspending and later terminating Jones," *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 724, which finding is a conclusion that Sky Chefs did not engage in unlawful retaliation. *Id.* at 725. This finding bears directly upon Sky Chefs' motivation for suspending the petitioner; and determinations regarding motivation and intent depend upon complicated inferences from the evidence and are therefore peculiarly within the province of the factfinder. *Thornbrough v. Columbus and Greenville R.R. Co.,* 760 F.2d 633, 641 (5th Cir. 1985) This finding was not clearly erroneous and is based on credible evidence. *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564 (1985); and it should not be disturbed by the petitioner's attempt here to separate the two simultaneous acts upon which

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[2] The petitioner obviously believed there was a connection between the two because she testified that the very charge she had filed was itself then intended to be a class-wide, multiparty claim of discrimination. (1R 46, 54-58; 4R 19-21 and Exhibit 1 thereto).

Sky Chefs "had reasonable grounds" for "suspending... Jones."

However, even if there is direct evidence of a statutory violation by Sky Chefs, the petitioner's argument still fails, for the simple reason that there is no direct evidence whatsoever to indicate that the petitioner's filing of a charge had anything to do with her termination. If the petitioner's argument is accepted at face value, there is only direct evidence in the record to indicate that her filing of the charge of discrimination was one of the reasons for her suspension. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 726-727 n. 14. An examination of the opinion and record below shows that there is no direct evidence of any kind that the petitioner's filing of a charge of discrimination had anything to do with her termination. *Jones v. Flagship International, d/b/a Sky Chefs,* 793 F.2d at 714-715 n. 3. Rather, the petitioner must rely solely upon the fact of her filing a charge as inferential evidence to make out a *prima facie* case; and inasmuch as the petitioner was paid during her suspension, *Id.* at 726, the petitioner's argument here becomes an academic exercise of little or no value.

Thus, the petitioner was relegated to the *McDonnell Douglas* and *Burdine* allocation of burdens and order of presentation of proof in a Title VII case. The shifting burdens of proof set forth in *McDonnell Douglas* and *Burdine* are specifically designed to assure that the plaintiff has her day in court despite the unavailability of direct evidence. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. at 111; *Thornbrough v. Columbus and Greenville R.R. Co.,* 760 F.2d at 638. It was under the *McDonnell Douglas* and *Burdine* allocation of burdens and order of presentation of proof that the Fifth Circuit decided that the petitioner's conduct in soliciting or inviting others to join in her discrimination claim, coupled with her expressed intent to

serve at the vanguard of a class action suit, was not protected under Section 704(a) and provided Sky Chefs with a nondiscriminatory basis upon which to suspend and discharge the petitioner. The Fifth Circuit then held that the petitioner failed to present evidence to show that Sky Chefs' stated reasons were a pretext for discrimination. Inasmuch as there was no direct evidence of a statutory violation by Sky Chefs in the petitioner's discharge, the petitioner was certainly relegated to the *McDonnell Douglas* and *Burdine* allocation and tests, and the Fifth Circuit utilized the proper legal standard in reviewing the decision of the trial court. Thus, there is no conflict between the opinion below and this Court's opinion in *Trans World Airlines, Inc. v. Thurston,* 469 U.S. at 111 or the opinion of the Eleventh Circuit in *Lee v. Russell Cty. Bd. of Educ.,* 684 F.2d 769 (11th Cir. 1982).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Respondent.

CERTIFICATE OF SERVICE

I, Thomas L. Case, a member of the Bar of this Court, hereby certify that on this 23rd day of December, 1986, three copies of the Brief of Respondent, Flagship International, d/b/a Sky Chefs, in Opposition to Petition were mailed, first-class postage prepaid, certified mail return receipt requested, to Mr. Morris W. Thompson, 904 West 2nd Street, Little Rock, Arkansas 72201, counsel for the petitioner. I further certify that all parties required to be served have been served.

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